VIRGINIA LAW REGISTER.

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MISCELLANEOUS NOTES.

MESSRS. CALLAGHAN & Co., the well-known Chicago Law Publishers, announce a new edition of the Michigan Reports, at the remarkably low price of $108 for the full set of 108 volumes. We refer to our advertising pages for particulars. Few of the State reports stand higher, or are more frequently cited, than those of Michigan, and we envy the lawyer who has easy access to them.

AMERICAN LAW IN ENGLAND.—Our English friends are not prejudiced against everything American. Englishmen of unquestioned patriotism have been known to have Chicago beef upon their tables, and dividends from American shares in their pockets. They admit to their shores, without protest, New York heiresses and Pribilof seal skins. The Albemarle pippin from Virginia is said to be the favorite apple of Her Majesty the Queen. If publishers' announcements speak truly, American magazines may be bought in London, and American atmosphere is thought to be an excellent tonic for reprobate younger sons of the English nobility.

But there is one product of the Western World at which our friends draw the line. They will none of your American *law*. Hear the danger signal sounded by *London Law Notes* for July, 1896:

"For the first time on record, we believe, there appears in a head-note to a case reported in the 'Law Reports,' *Kennedy v. De Trafford* (1896), 1 Ch. 763, a recognition of an American case. The head-note runs '*Van Horne v. Foudre* [5 Johns, Ch. (N. Y.) 388] not followed.' Sir Frederick Pollock, we suppose, is responsible for this innovation. Now, most of our appeal judges, it must be remembered, have expressed strong opinions against this custom of citing American decisions. As Lord Halsbury neatly put it, this opposition to the practice is not due to any want of appreciation on our part of the ability of American lawyers. We have the highest opinion of their abilities. It is simply that the citation of an American case involves an inquiry which is often not at all easy, whether the law of America on the subject on which the point arises is the same as our own. It must also be remembered that American lawyers are, at the present time, distressed at the multiplicity of Digests, Reports and Decisions, and are alarmed at the rate at which they are accumulating, each State having, apparently, its own reports. Now, we ourselves have a fair burden of reported decisions. Surely Sir Frederick Pol-

lock does not propose to add all the American digests to our already heavy burden. The profession would do well to speak out in no uncertain tones on this subject, else we shall have this done again and again until it becomes recognized and adopted by all reporters."

THE VIRGINIA LAW REGISTER IN THE WEST.—The contents of the VIRGINIA LAW REGISTER are not copyrighted, and other journals have the legal right as well as our own consent to reproduce anything appearing in its columns. But custom and courtesy both suggest that when so reproduced due credit be given. The *Chicago Law Journal* publishes in its July number, without credit, the article of Mr. J. B. Ranson, on Liability of a Guarantor, from our June number, and the *Chicago Law Journal Weekly* reproduces, with like omission of credit, Mr. G. Carlton Jackson's article on the Duty of Cultivating the Spirit of Litigation, taken from our August number.

Since writing the foregoing, we have discovered further evidence of the labor-saving mission of the VIRGINIA LAW REGISTER. On opening the current number of the *Central Law Journal* (under date of September 25, 1896) we were confronted on its editorial page by two columns of strangely familiar matter—which the deadly parallel disclosed to be nothing more nor less than our complete editorial on *Green v. Coast Line R. Co.*, published in our August number (pp. 312–13), transferred bodily to the editorial pages of the enterprising journal named. Justice to our esteemed contemporary compels the admission that some of its matter was original. For example:

We wrote:	*The Central Law Journal says editorially:*
After this sugar-coating, the Georgia Nestor proceeds to show that even this high authority has failed to catch his theory of the positive and negative poles or the light from his Cathode ray, but is still stumbling about in tallow-candle half-light with the other authorities cited.	*After complimenting that work*, the Georgia Nestor proceeds to show that even this high authority has failed to catch his theory of the positive and negative poles or the light from his Cathode ray, but is still stumbling about in tallow-candle half-light with the other authorities cited.

The parallel might be continued throughout, without convicting our Western friend of the material alteration of documents.

Whether the foregoing instances are characteristics of American legal periodicals, or are but examples of Western enterprise, we are too young in the cause of journalism to assert.

LIABILITY OF PUBLIC OFFICERS FOR SAFETY OF PUBLIC FUNDS.—Loss of public money by a bank failure is held, in *Fairchild v. Hedges* (Wash.) 31 L. R. A. 851, to be no excuse for failure of a county treasurer to pay over the money. The authorities are in hopeless conflict on this subject. The tendency in former times was to regard the officer, who had received public money in the course of his official duty, as a debtor, and bound to repay at all events. This doctrine is well expressed by Mr. Justice McLean in *United States v. Prescott*, 3 How. 578: "This is not a case of bailment, and consequently the law of bailment does not apply to it. The liability of the defendant, Prescott, arises out of his official bond, and principles which are founded upon public policy. . . . . . The condition of the bond has been broken, as the defendant, Prescott, failed to pay over

the money received by him when required to do so; and the question is, whether he shall be exonerated from the condition of his bond on the ground that the money had been stolen from him. The objection to this defense is that it is not within the condition of his bond; and this would seem to be conclusive. . . . . . He knew the extent of his obligation when he entered into it; and he has realized the fruits of this obligation by the enjoyment of the office. . . . . . There is no principle upon which such a defense can be sustained. The obligation to keep safely the public money is absolute, without any condition, express or implied; and nothing but the payment of it, when required, can discharge the bond. Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that he should keep safely the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practised with impunity."

This case, with others following it from the same court, was practically overruled in *United States v. Thomas*, 15 Wall. 337, in which it was held that the office was not an insurer of the safety of the public funds in his custody, but a bailee with special liability, and that when he was deprived of the public funds by overruling necessity, he might plead such forcible deprivation as a defense.

The authorities *pro* and *con* are collected in an elaborate note to *State v. Harper* (Ohio), 67 Am. Dec. 363, 365–373. See also: *State v. Nevin*, 19 Nev. 162 (3 Am. St. Rep. 873, and note); *Rose v. Douglas Township*, 52 Kansas, 451 (39 Am. St. Rep. 354); *Wilson v. People*, 19 Col. 199 (41 Am. St. Rep. 243.)

EFFECT OF REPEAL OF STATUTE ON OFFENSES ALREADY COMMITTED.—It is a well-settled principle that the repeal of a penal statute, without a saving clause, operates to obliterate the statute from the statute-book as completely and effectually as if it had never existed. In such cases the extinction of the statute is an indication that the sovereign power no longer desires the former crime to be punished or regarded as criminal. The repeal operates retroactively and applies to crimes already committed and to prosecutions already commenced. And although there has been a conviction under the statute, if the repeal takes place while there is an appeal pending, the case must be dismissed in the appellate court: *Todd v. Landry* (La.), 12 Am. Dec. 479 and note; *Ex parte McCardle*, 7 Wall. 514; *Hartung v. People*, 22 N. Y. 95; *U. S. v. Tynen*, 11 Wall. 88; *Wharton v. State* (Tenn.) 94 Am. Dec. 214 and note; Bishop on Stat. Crimes, 177; *Scutt v. Commonwealth*, 2 Va. Cas. 54; *Attoo's Case*, Id. 382; *Commonwealth v. Leftwich*, 5 Rand. 657; *Pitman v. Commonwealth*, 2 Rob. 800, 813.

In Virginia it is expressly provided by a general statute (Code of 1887, sec. 6) that "No new law shall be constructed to repeal a former law, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offence or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising, before the new law takes effect; save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings; and if any penalty, forfeiture or punishment be mitigated by any

provision of the new law, such provision may, with the consent of the party affected, be applied to any judgment pronounced after the new law takes effect."

In Virginia, therefore, when a penal statute is unqualifiedly repealed, offenses already committed under it are in nowise affected; but if, instead of wiping out the penalty, the subsequent statute merely mitigates it, then with the consent of the accused or party affected, the mitigated penalty may be applied.

While a *repeal* is, in a loose sense, a *mitigation*, the statute quoted clearly draws a distinction between the two expressions. If, for example, the statute of usury were repealed, existing usurious contracts would not be subject to the operation of the repealing statute, but the borrower might still insist upon a forfeiture of the entire interest. On the other hand, if the statute of usury were amended by a reduction of the penalty to a forfeiture only of the excess of interest above the legal rate, the creditor would be entitled to the benefit of the mitigated penalty.

To construe an absolute repeal as a mitigation, and to give the accused or party affected the benefit of the remission of the entire penalty, under the final clause of the statute quoted, would render the first part of the statute wholly nugatory. Such a construction would, in effect, convict the legislature of saying that no repeal shall affect a penalty or forfeiture already incurred, except that with the consent of the accused, or party affected, he shall go scot-free.

The section quoted applies as well to penalties and forfeitures in civil proceedings as to those in criminal proceedings: *Mosby v. St. Louis Mutual Ins. Co.*, 31 Gratt. 629. Section 4204 of the Code of 1887 is almost a duplicate of section 6, but is confined in its operation to repeals effected by the adoption of the Code.

WHAT IS THE USE AND VALUE OF LITIGATION?—This question is answered by the late Dr. Austin Abbott, in an article entitled, "Delay and Uncertainty in the Administration of Justice," printed in the *American Law Register and Review* for June, 1896:

First, it supersedes private contention, precludes resort to violence and circumvention for self-redress, and terminates quietly and efficiently the specific controversy submitted.

Second, the existence of the court, and the force which stands behind it, prevents many differences from ripening into controversies.

Third, the results of litigation present to the community rules of justice well reasoned out, officially sanctioned and formally announced as rules that will be applied to all similar cases, thus defining universal rights and precluding future differences of the same kind.

When men are involved in controversy the immediate effect of a resort to litigation is to take the question out of their hands, and render private passion futile, and when the question is finally decided by a disinterested tribunal, the state itself enforces the decision, thus precluding future controversy. A quarrel stops the progress of affairs. The law lifts the quarrel, and lets affairs go on. It is as when the whole current of street traffic in a city is stopped by two angry drivers of colliding teams. The law takes the contestants out of the line, and lets traffic proceed.

This immediate effect of litigation is felt far beyond what is indicated by the number of causes actually tried. The number of controversies which resort to

the courts that are settled without actual trial, is far larger than many persons suppose. I have not at hand the means of stating the American experience on this point; and in many of our jurisdictions where attorneys begin actions without causing record thereof in the clerk's office, it would be impossible to ascertain the facts. But in a recent year in England (1879) the facts recorded, according to their practice, showed that out of every ten thousand actions commenced, only three hundred and seventy-eight were brought to trial; there were twenty-five hundred and sixty-eight settled without appearance; thirty-five hundred and forty-four went to judgment by default, or otherwise, as undefended; and thirty-five hundred and ten were partly litigated, but either settled or abandoned without judgment.

If we assume that one-half the cases litigated but not decided were settled, we find that in round numbers the actual trial of two thousand cases in a year's work carried along with it the immediate termination of forty-five thousand other controversies.

But the settling of controversies which actually come to be litigated is by far the smaller part of the service which litigation renders to the community. The courts in deciding a litigated case reason out the principles of justice involved, apply them, and set forth the result in an intelligible and authoritative form, which, becoming known in the community, may forestall thousands of like controversies which otherwise would arise to disturb the peace of families and the progress of business.

A single litigation, well contested all the way up to the court of last resort and considerately determined there, will not only settle the particular controversy which gave rise to it, and lead also to the settlement or discontinuance of a number of similar suits; but, when reported, the principles affirmed by the court enter into the law of the state and for years, yes for generations, afterward, when men in a similar controversy apply to attorneys for redress, the same answer is ready for both sides, "the courts have settled that, it is no use to fight it." It would be impossible to state the usages of a single business or trade, or to describe any phase of domestic or social relations of the present day without mentioning numerous points of contact where the peace and prosperity of the community is due to the service which the courts are rendering through litigation in thus removing obstructions from the channels of life. This is an endless service. The increasing complexity of modern affairs gives rise to new questions as fast as the courts can settle them. It is the ingenuity of men in producing new situations of doubtful rights that taxes the ability of our present judicial system to the utmost to develop rules which must settle the resulting controversies.

PREFERENCE TO DIRECTORS AND OFFICERS.—In discussing the right of the directors of a corporation, to secure their claims by executing deeds of trust or mortgages of the corporate property, Mr. Reid, in his treatise on "Corporate Finance," says in a note (1084): "A doctrine established by the best considered cases and by the decisions of the Supreme Court of the United States is, that the mere fact that creditors of the corporation are directors and stockholders, does not prevent their taking security to themselves as individuals, to secure a *bona fide* loan of money, previously made to such corporation, and used by it in conducting its legitimate corporate business. Among the States maintaining this doctrine may

be mentioned Vermont, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Virginia, Illinois, Minnesota and Iowa. In support of this note the writer cites only two Illinois cases, *Harts v. Brown*, 77 Ill. 226, and *Reichwald v. Hotel Co.*, 106 Ill. 439. Since writing this note the Illinois court has added the case of *Blair v. Illinois Steel Co.*, heretofore published in XI Nat. Corp. Rep. 615, which strengthens the assertion of Mr. Reid. The latter calls attention to an exhaustive and voluminous discussion of this question by the Minnesota Supreme Court in *Hospes v. Car Co.*, 50 N. W. Rep. 1117. The reasoning of Judge Mitchell makes it extremely clear that an insolvent corporation may prefer its creditors, whether they may be officers of the corporation or strangers, and there is no foundation for the doctrine that the insolvency of the corporation has the effect to convert its assets into a "trust fund," in the technical sense of the term, and its officers into mere trustees, charged with the duty of distributing its assets, ratably among its creditors.

While it may be said that this doctrine is growing into favor from day to day, the courts will always view the relation of a director, officer or stockholder with considerable watchfulness and such transactions will likely be credited as exceptional in their character. Three elements must enter into the success of such a transaction—good faith, the benefit of the company and its creditors, and the transaction must not be used as a means to destroy the company. We question very much whether the present state of the law on this subject will be a sufficient stimulus to risk much capital on the stability of these decisions, and yet they are logical enough.

In this connection we print a communication from Hon. Mark Bangs, of the Chicago bar, who has evidently not seen the Blair decision, which reads as follows:

"*Editor National Corporation Reporter:*

The law of Illinois seems to be firmly settled, that a corporation, whether solvent or insolvent, has the absolute right, at any time before the intervention, by a proper proceeding, of a court of equity, to prefer any of its *bona fide* creditors, to the exclusion of all its other creditors, with the single, and it would seem the anomalous exception, of a creditor who happens also to sustain the relation of director or officer, to the corporation.

"This exception seems inconsistent and not supported by reason.

"Our law declares that a director has a perfect right to become a creditor of a corporation, in good faith, to any extent. This right is thoroughly recognized. In this respect he is simply a corporate creditor, nothing more, nothing less. As such creditor he is, and of necessity must be, as really and fully a stranger to the corporation as any of its creditors. The fact that he is an agent of the corporation can neither limit nor enlarge his character and rights or duties as to its *bona fide* creditors.

"The corporation, in electing to prefer, and in actually preferring some of its creditors, acts as a legal entity. It sustains no fiduciary relation to its creditors. It is under no legal or equitable obligation to consult any of its creditors as to which of them it will prefer. The directors and officers, by and through whom it acts, in making a preference, do not act in their personal or individual, but in their official capacity. They sustain no fiduciary or official relation to the corporate creditors. It is a matter of no official or representative concern of theirs, as

to what particular creditor should be preferred, or whether any preference at all, shall be given. They do not own the corporate property, nor can they have any official personal interest therein. They, as individuals, owe no duty to the corporate creditors. As corporate officials, their only duty is to act for the corporation. The corporation is compelled to act, if it act at all, by and through these officials. It is perfectly clear that the corporate entity, thus acting, holds no greater, other or different relation, fiduciary or otherwise, to its creditors, than does an individual to his creditors, which is none at all.

"And the law seems to be clear and unequivocal, by the recent decisions of our Supreme Court, that neither the corporation itself, nor its directors and officers, hold any fiduciary relation to corporate creditors, with the single exception above challenged. True, our court holds, that when by reason of insolvency, a court of equity, under a proper proceeding, takes charge of insolvent corporate assets, the character of the corporate directors and officials is changed. Whereas, prior to such proceeding, as shown above, these directors and officers sustain no relation to corporate creditors, yet, by this proceeding, and for the reason that they are in possession and have the custody of the corporate property, they are made to be trustees for all creditors, and can lawfully act in no other capacity, as to the future disposition of the corporate property. Under their agency as such trustees, and by the direction of the court, the corporate property is beyond the control, or the preferential disposal, of the corporation. By this equity proceeding, the entire scene is changed.

"A *bona fide* official creditor, therefore, having the same liberty and right to become a creditor, as any unofficial creditor has, why should he not stand equally entitled to receive the preference which the law allows to all corporate creditors? The right of corporate preference is not a right of any creditor. It is not the right of the directors or officers. The corporation alone stands clothed under the law with this right to prefer. How is it possible that the unpreferred creditors shall be deprived of any rights by the preference of an official creditor, beyond what would arise from preference given, in an equal amount, to an unofficial creditor?

"It is not possible. Evidently, all honest creditors should stand upon an equality as to any legal act of preference. There can be no greater presumption of injustice or fraud, in the one case than in the other.

"This discrimination against an honest official creditor is evidently only a lingering aroma of the early and, it would seem, the inconsiderately announced doctrine, in earlier cases to the effect that as soon as corporate insolvency supervenes the corporate property becomes a trust fund for corporate creditors, of which the directors are trustees. The trend of judicial construction should and doubtless will remove this really groundless discrimination against an honest official corporate creditor by allowing him to be preferred, or by prohibiting all preferences by an insolvent corporation."—*National Corporation Reporter.*

In this connection, see *Burr v. McDonald,* 3 Gratt. 215; *Planters Bank v. Whittle,* 78 Va. 737; *Pyles v. Riverside Furniture Co.,* 30 W. Va. 123 (2 S. E. 909).

The authorities on this much-debated question are collected, and the subject itself elaborately discussed in 5 Thompson on Corp. 6492–6508. Judge Thompson argues at length against the doctrine as asserted above. He finds it impossible not to use intemperate language in referring to it. He declares it entitled "to no respect"—that it is a "low conception" of justice—that it is "infamous"—that it is "not profitable to quote the mouthings of judges upon the question."

It may be important to observe that it is provided by section 1122 of the Virginia Code, that "no member of the board (of directors) shall vote on a question in which he is personally interested otherwise than as a stockholder."